



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

October 26, 1993

Honorable David Counts
Chair
Natural Resources Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

Letter Opinion No. 93-97

Re: Whether a city may annex that portion
of a municipal utility district lying within its
extraterritorial jurisdiction, and related
questions (RQ-422)

Dear Representative Counts:

Your predecessor as Chair of the Natural Resources Committee asked several questions regarding the legal ramifications of a proposed annexation of part of a municipal utility district ("MUD") by a municipality. These questions presuppose that the MUD is composed of two separate, noncontiguous areas of land, each of which lies wholly within the extraterritorial jurisdiction ("ETJ") of separate municipalities. They also posit that the MUD has issued bonds and entered into several "utility development agreements" with developers of property in the MUD that is not part of the proposed annexation. The bonds are secured by and payable from a tax upon all taxable property within the district. The utility development agreements obligate the MUD to reimburse the developers for the design and construction of certain utility facilities. The request letter adds that "[t]he parties presently contemplate a restructuring of the district's debt pursuant to a refunding."

Upon these stipulations, the following questions were asked:

- (1) Is the noncontiguous portion of the MUD subject to annexation under Local Government Code section 43.075(f)?
- (2) Upon annexation by the municipality, does the MUD continue to exist, subjecting the citizens to taxation by the municipality and the MUD?
- (3) Assuming that annexation of a portion of the MUD would result in a decrease in the tax base of the MUD and would have an adverse effect on its ability to issue bonds, what is the MUD's liability to the developers under section 43.0715 of the Local Government Code?
- (4) Would the annexing municipality's refusal to reimburse the developers pursuant to section 43.0715 prevent the proposed partial annexation?

Section 43.075 of the Local Government Code applies to:

(1) a municipality that annexes all or part of an area in a water control and improvement district, fresh water supply district, or municipal utility district organized for the primary purpose of providing municipal functions such as the supplying of fresh water for domestic or commercial uses or the furnishing of sanitary sewer or drainage service; or

(2) a municipality:

(A) [that, by its incorporation, includes all or part of a district described in subdivision 1 and that adopts, by at least a two-thirds vote of its governing body, an ordinance making this section applicable to the city].

Local Gov't Code § 43.075(a). Subsection (b) of section 43.075 states that its provisions do not apply "if the district [to be annexed] includes area located in more than one municipality." A municipality that annexes the entire area of a district succeeds to the powers, duties, assets, and obligations of the district to the degree and in accordance with the procedures provided in section 43.075. *Id.* § 43.075(c), (d), (h) - (l).

An initial question is whether a district in the ETJ of a municipality is a "part" of the municipality for purposes of section 43.075. The concept of extraterritoriality is described as the operation of laws or juridical authority beyond the physical boundaries of a governmental entity. See BLACK'S LAW DICTIONARY 528 (definitions of "extraterritorial," "exterritoriality," and "exterritorial jurisdiction"). A district in the ETJ of a city is therefore by definition not physically a part of the city. It is also well settled that a city may not, in the absence of an express statutory provision, exercise its municipal powers outside its corporate boundaries. *City of Westlake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 686 (Tex. Civ. App.--Waco 1980, no writ); see also Attorney General Opinion JM-811 (1987). Thus, political subdivisions within a city's ETJ are, as a general rule, insulated from the full range of municipal powers. Consequently, we think a MUD situated in the ETJ of two cities is not, either physically or legally speaking, a part of either municipality.

Because the MUD in this hypothetical question is not a part of more than one municipality, the annexation of this district is at least facially within the terms of section 43.075. Furthermore, the only other provision that we have identified which ostensibly would affect the annexation of the MUD in the scenario is rendered inoperative in this instance. Section 43.071 of the Local Government Code applies to the annexation of a "water or sewer district"--a district or authority created pursuant to article III, section 52(b)(1) and (2) or article XVI, section 59 of the Texas Constitution, whose principal function is the delivery of water or sewer services but not the wholesale distribution of water. Local Gov't Code § 43.071(a). It generally requires a city to annex the entire area of such a district that is outside its corporate boundaries and to include that area in the computation of the maximum area that the city may legally annex in a calendar year under

section 43.055 of the Local Government Code. *Id.* § 43.071(d). These requirements do not apply, however, to the annexation of a district "that has a noncontiguous part that is not within the extraterritorial jurisdiction of the municipality." *Id.* § 43.071(e)(2).

Subsection (f) of section 43.075 provides that

[i]f only part of the area in the district becomes a part of the municipality, the governing bodies of the municipality and the district may make contracts relating to the division and allocation between themselves of their duplicate and overlapping powers, duties, and other functions and relating to the use, management, control, purchase, conveyance, assumption, and disposition of the property and other assets, debts, liabilities, and obligations of the district. [Emphasis added.]

Assuming the applicability of section 43.075 to the proposed annexation described, subsection (f) clearly is applicable. However, subsection (g) of section 43.075 may also apply. It authorizes the governing bodies of the annexing municipality and the annexed district to contract for the municipality's operation of the district's utility systems and other property for a period of not more than 30 years. *Id.* § 43.075(g). The governing bodies may also agree to the transfer, sale, or conveyance of the district's assets, whether located inside or outside the city's boundaries. *Id.* The contract may not impair the contractual obligations of either the city or the district, however. *Id.* In the absence of a contract, the district is authorized to continue operating as it did prior to the annexation. The city is prohibited from duplicating district services in the annexed portion of the district without the district's consent but may perform all other municipal functions in the area. *Id.*

The answer to the first question asked, therefore, will depend on the willingness of the governing bodies of the city and MUD to agree to a division of functions and liabilities and the effect that any assumption of functions or liabilities will have on the contractual obligations of either entity. Section 43.075 does not, however, require that the MUD and city agree to a division and allocation of functions and powers. In the absence of an agreement between the MUD and the city, we believe the provisions of subsection (g) of section 43.075 forbids the city from duplicating the services of the MUD within the area served by the MUD.

The second question asked is whether upon annexation the MUD continues to exist, thereby exposing the residents of the district to taxation by both the city and the MUD. Section 43.075 by its terms does not require the dissolution of the district, and we are unaware of any other provision that requires the district to cease operations under these circumstances. Neither do we believe that the levy of taxes by both the MUD and city upon the property owners residing within the annexed area is facially improper. As noted in Attorney General Opinion JM-930 (1988),

[t]he constitution of this state does not expressly condemn double taxation. . . . [T]he courts have held that property lying within the boundaries of both a city and a special district and subject to taxation

by both for the same kinds of services does not constitute unconstitutional double taxation or taxation that is not equal and uniform [under article VIII, section 1 of the Texas Constitution]. *City of Pelly v. Harris County Water Control and Improvement District No. 7*, 198 S.W.2d 450 (Tex. 1946); *Moore v. Edna Hospital District*, 449 S.W.2d 508 (Tex. Civ. App.--Corpus Christi 1969, writ ref'd n.r.e.); *Kuhlmann v. Drainage District No. 12 of Harris County*, 51 S.W.2d 784 (Tex. Civ. App.--Galveston 1932, writ ref'd). See also Attorney General Opinions JM-626 (1987); JM-400 (1985).

Attorney General Opinion JM-930 at 2-3.

The third question asked is premised on the assumption that the proposed annexation would result in a decrease in the tax base of the district and would have an adverse effect on its ability to issue bonds. Since we have not identified any statutory provision that requires the dissolution of the annexed area of the MUD, we do not believe there would be a physical reduction in the tax base of the district. Assuming, however, that the annexation does have an adverse effect on the district's ability to issue bonds, the question presented is what the MUD's liability to the developers is under section 43.0715 of the Local Government Code.

Section 43.0715 applies to the annexation by a city of less than 1.5 million population of a special district that has as one of its purposes the delivery of fresh water for domestic or commercial use or the furnishing of sanitary sewer services or drainage. The section provides that if the annexation

precludes or impairs the ability of the district to issue bonds, the municipality shall, simultaneously with the annexation, pay in cash to the landowner or developer of the district a sum equal to all actual costs and expenses incurred by the landowner or developer in connection with the district that the district has, in writing, agreed to pay and that would otherwise have been eligible for reimbursement from bond proceeds under the rules and requirements of the Texas Water Commission as such rules and requirements exist on the date of annexation. [Emphasis added.]

Under the literal terms of this provision, if the proposed annexation were to result in the impairment of the MUD's ability to issue bonds, then the city would be required to compensate landowners and developers in the MUD, even those in the unannexed, noncontiguous area of the MUD.

The final question is whether the municipality's refusal to reimburse the developers pursuant to section 43.0715 would prevent the proposed partial annexation. As we have noted above, we do not believe that the requirement contained in section 43.0715 will necessarily be triggered by a partial annexation. However, the annexation cannot move

forward under the terms of section 43.075 if outstanding contracts of the sort at issue here are impaired. Accordingly, in the event that the annexing municipality were to be obligated under the statute to reimburse landowners and developers, and refused, then the proposed partial annexation would be prevented.

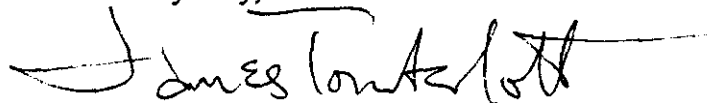
S U M M A R Y

Section 43.075 of the Local Government Code permits but does not require that the governing bodies of a municipal utility district ("MUD") consisting of two separate, noncontiguous areas of land in the extraterritorial jurisdiction of two municipalities, and a municipality seeking to annex one of those areas, may agree to a division and allocation of powers, duties, and functions of the district. In the absence of such an agreement, section 43.075(g) of the Local Government Code provides that the city may not duplicate the MUD's services within the area previously served by the MUD.

Section 43.075 does not require by its terms that the MUD cease to exist upon annexation. Double taxation by the MUD and the city is not constitutionally impermissible.

In the event that annexation impairs the MUD's ability to issue bonds, section 43.0715 of the Local Government Code would require the city to compensate landowners and developers in the MUD. Should the city refuse to pay such compensation, the proposed partial annexation could not go forward.

Yours very truly,

A handwritten signature in black ink, appearing to read "James Tourtelott", with a long horizontal flourish extending to the right.

James Tourtelott
Assistant Attorney General
Opinion Committee